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No. 81-2258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SALVATORE INCORVAIA,

Respondent,

-against-

HELLENIC LINES LTD.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the workmen's compensation lien of a stevedore-employer should be afforded priority over the claim for attorney's fees, by the plaintiff's counsel, in a personal injury action, brought against a shipowner, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act?
2. Whether this priority of claims is to be construed differently when the shipowner and the stevedore-employer are the same entity?

COMPANIES AFFILIATED WITH PETITIONER

Listing, pursuant to U.S. Sup. Ct. Rule 28.1, 28 U.S.C. 28.1 (1981), of companies affiliated with the Petitioner, Hellenic Lines Ltd.

1. Hellenic American Agencies, Inc.
2. Universal Cargo Carriers
3. Transpacific Carriers Corp.
4. Trade Asia PTE Ltd.
5. Trade Orient Co. Private Ltd.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, not yet reported, appears in the Appendix. The opinion of Judge Edward Neaher of the United States District Court for the Eastern District of New York, reported at 502 F.Supp. 280 (E.D.N.Y. 1980), appears in the Appendix.

JURISDICTION

This action originated in the United States District Court for the Eastern District of New York. Jurisdiction in the District Court was based upon diversity, 28 U.S.C. 1332 (1976). The amended judgment, which is the subject of this review, was entered by the District Court on December 31, 1980. A Notice of Appeal was filed by plaintiff's counsel on January 28, 1981 in the District Court and entered in the Court of Appeals on January 30, 1981. An opinion and judgment reversing the District Court were filed in the United States Court of Appeals for the Second Circuit on January 5, 1982.

A timely petition for rehearing and suggestion for rehearing en banc was filed. This petition was

accompanied by a brief of Sea Land Services, Inc., as amicus curiae.

Rehearing en banc was denied on March 11, 1982. A Notice of Appeal to the Supreme Court was filed in the U.S. Court of Appeals, Second Circuit, on May 20, 1982. This petition for certiorari is being docketed within 90 days from the denial for rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. (1976)

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §933 (a), (b), (e) (1976)

§933 (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

§933 (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

§933 (e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

STATEMENT OF THE CASE

The petitioner, Hellenic Lines Ltd. (a vessel owner and the stevedore-employer of the respondent), maintains that the employer's compensation lien has priority over a claim for attorney's fees on any amount recovered by the longshoreman in a third party suit against the vessel owner. Petitioner further contends that where, as here, the shipowner and the stevedore are the same entity, the compensation lien must be afforded priority.

In reliance upon what it perceived to be the principles established by the Longshoremen's and Harbor Workers' Compensation Act, the Second Circuit, in the decision below, held that, in all instances, the claim for attorney's fees has priority. It is respectfully submitted that the Second Circuit's

ruling conflicts in principle with the decisions of this Court; the decision of another Circuit; and the so-called "American" rule.

This action was instituted by a longshoreman, Salvatore Incorvaia, against the defendant, Hellenic Lines Ltd., in its capacity as a shipowner, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. (1976). The plaintiff sought damages for personal injuries sustained while working aboard the defendant's vessel. The defendant, Hellenic Lines Ltd., simultaneously functioned, at that time, as a stevedore. In this latter role, Hellenic employed the plaintiff.

Following a jury verdict, judgment was entered for plaintiff in the amount of $17,150. Pursuant to the provisions of the Longshoremen's and

Harbor Workers' Compensation Act, plaintiff had previously been paid $13,544.91 in compensation and medical benefits by Hellenic Lines Ltd.

Thereafter, Hellenic Lines asserted a lien against the recovery in the amount of the workmen's compensation benefits. Plaintiff's attorney also claimed against the recovery for attorney's fees of 40% plus disbursements, based upon his retainer with the plaintiff. Plaintiff's counsel moved for an order directing payment of his fee in the amount of $7,109.36. He asserted priority over the compensation lien.

The District Court denied the plaintiff's motion and held that the compensation lien had priority over the claim for attorney's fees. The U.S. Court of Appeals for the Second Circuit reversed, stating that the

claim for attorney's fees had priority over the compensation lien.

It should be noted that irrespective of the relative priority of these liens, in applying the formula of either Court, the plaintiff will not receive any money from this third party action.

A timely petition for rehearing and suggestion for rehearing en banc (accompanied by a brief of Sea Land Services, Inc., as amicus curiae) was denied. Petitioner here seeks writ of certiorari pursuant to 28 U.S.C. 1254 (1). The jurisdiction in the U.S. District Court, Eastern District of New York, was based upon 28 U.S.C. 1332.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THE DECISION OF THIS COURT IN BLOOMER v. LIBERTY MUTUAL INSURANCE CO.

The Second Circuit's decision below is in direct conflict with the decision of this Court in Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980). Bloomer examined the question of whether a stevedore-employer, who had made compensation payments to a longshoreman for an injury he sustained on a vessel, would be required to share the litigation expenses of the longshoreman's suit. Specifically, would the employer be required to pay a proportionate share of the attorney's fee for the longshoreman's counsel.

It was argued in Bloomer that, in certain circumstances, the Court should exercise its equitable powers and assess against the lienholder a proportionate share of the expenses of suit. The rationale advanced was that an attorney, who creates a fund for the benefit of another, is entitled to reasonable compensation. In other words, a "common fund" should be made available to permit an employee to recover these expenses from the stevedore.

The Court rejected this argument, by holding that when measured against the language, structure and history of the Longshoremen's and Harbor Workers' Compensation Act, the stevedore is not required to share in the longshoreman's litigation expenses.

Simply put, the Bloomer Court viewed the Congressional intent as an

adherence to the uniform rule that the longshoreman's legal fees would be paid by the longshoreman alone. The Court was "unwilling to attribute to Congress an intention to allow creation of a new liability irreconcilable with its general desire to reduce litigation and to insure conservation of the legal expenses of stevedores and their insurers. . . ." 445 U.S. at 86.

Contrastingly, in the instant action, the Court of Appeals, Second Circuit, held that: "the legislative history of the LHWCA, leads to a conclusion that the compensation lien applies only to the longshoreman's net proceeds from the negligence suit, after deduction of litigation expenses and a reasonable attorney's fee". Incorvaia v. Hellenic Lines Ltd., ____ F.2d ____ (2d Cir. 1982) (See opinion

in Appendix at 4).

The Court of Appeals herein agreed with the District Court that the common fund doctrine provides no support for priority of the attorney's lien "where the shipowner and the stevedore are the same entity". (See opinion in Appendix at A9-10)Where the appellate panel, however, differed with the District Court was in the interpretation to be afforded to the legislative history and to the judicial precedents to the statutory scheme. Specifically, petitioner submits that the Second Circuit misapplied the concept of "net recovery". The "net recovery" should, in petitioner's view, encompass only the amount remaining after the satisfaction of the compensation lien. It is respectfully submitted that it is

in this interpretation that the Second Circuit departed from the principle laid down in Bloomer and failed to adhere to the uniform rule that the "longshoreman's legal fees would be paid by the longshoreman alone".

The dissent in Melvin v. Strachan, 327 F.2d 83 (5th Cir. 1964), put it succinctly when it stated:

> I suppose we could overlook allowance of extraordinary compensation to a lawyer despite the fact that the legal services conferred no benefit or even were a detriment to his only client, if somewhere in this vague picture one could find that the lawyer did perform valuable services for someone, whether his client or not. But it is going too far too fast to suppose that while the employer may recoup part or all of his compensation payments

> out of the recovery, the suit was in any sense instituted in his behalf, or for his benefit or, for that matter, he wanted it at all.

327 F.2d at 90 (5th Cir. 1964)

If the rule announced in Incorvaia provided some incidental benefit to plaintiff's counsel while accomplishing a liberal application of the Longshoremen's and Harbor Workers' Compensation Act in favor of the injured maritime worker, there might be some justification for the judicial construction given by the Second Circuit. Unfortunately, the rule announced works against the injured worker and subordinates his interests to those of a lawyer with a contingent fee.

Therefore, the decision of the Second Circuit herein conflicts in

principle with Bloomer and warrants review by this Court.

II

THE DECISION OF THE SECOND CIRCUIT IS IN CONFLICT WITH THE RECENT DECISION OF THE FIFTH CIRCUIT IN LEBLANC v. PETCO, INC.

Prior to Bloomer, the U.S. Court of Appeals for the Fifth Circuit had also considered this question of the conflicting claims for attorney's fees and the compensation carriers' assertions of their liens. The decisions of that Circuit had addressed factual situations where the recovery was both sufficient, and insufficient, to satisfy these claims. See, Haynes v. Rederi A/S Aladin, 362 F.2d 345 (5th Cir. 1966), cert. denied, 385 U.S. 1020 (1967); Chouest v. A & P Boat Rentals, 472 F.2d 1026 (5th Cir. 1973); Mitchell v. Scheepvaart Maatschappij Trans-Ocean, 579 F.2d 1274 (5th Cir. 1978).

These decisions shared the view that where the reimbursement of the employer's compensation carrier is achieved through the efforts of plaintiff's counsel, a reasonable fee for plaintiff's counsel may, if necessary, be levied for recovery of the compensation.

Without expressly overruling these decisions, the Fifth Circuit in LeBlanc v. Petco, Inc., 647 F.2d 617 (5th Cir. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 644 (1982), adopted a different view. In LeBlanc, the Fifth Circuit reversed the trial court's award of attorney's fees and adhered to Bloomer. The Court of Appeals held that:

> Subsequent to the trial court's decision, the United States Supreme Court held in Bloomer v.

> Liberty Mutual Insurance Co. . . .that under the Longshoremen's and Harbor Workers' Compensation Act. . .no such reduction in the compensation lien is to be made. Accordingly, the trial court erred in reducing American Home's compensation lien for a portion of LeBlanc's attorney's fees.

647 F.2d at 618-619.

This conflict in the Circuits further justifies the granting of this petition.

III

THE OPINION BELOW CONFLICTS WITH THIS COURT'S DECISION IN ALYESKA PIPELINE SERV. v. WILDERNESS SOCIETY

As previously noted, the Court of Appeals, Second Circuit, agreed with the District Court that the common fund doctrine was inapplicable as a basis for the awarding of attorney's fees. Clearly, there is no statutory authority for such an award under the Longshoremen's and Harbor Workers' Compensation Act. Therefore, this Court's decision in Alyeska Pipeline Serv. v. Wilderness Soc., 421 U.S. 240 (1975) is the only other source of authority for the awarding of attorney's fees. Alyeska set forth two exceptions to the "American" rule that each party should bear its own counsel fees. The factual situation in this case does not embrace either of these two exceptions. In

particular, one of the exceptions was, in fact, rejected by Bloomer.

Therefore, this Court should review this matter in order to reinforce its adherence to the "American" rule on awarding attorney's fees.

IV

HELLENIC LINES LTD'S. UNIQUE STATUS AS A SHIPOWNER AND STEVEDORE-EMPLOYER DEMANDS THAT THE COMPENSATION LIEN BE GIVEN PRIORITY OVER ANY CLAIM FOR ATTORNEY'S FEES

The District Court below recognized the unique status of Hellenic as a shipowner that also functioned as its own stevedore. Accordingly, that Court required that the compensation lien be afforded priority over the claim for plaintiff's attorneys' fees.

The District Court further recognized that if Hellenic Lines as stevedore was statutorily assigned the plaintiff's cause of action, it could not sue itself, as vessel owner, for negligence; nor avail itself of the Section 933 (b) defense under the Act. There is an inherent conflict of interest. See, Czaplicki v. SS Hoegh Silver Cloud, 351 U.S. 525 (1956).

Because of Hellenic Line's business structure, its relationship to an injured employee as a defendant in a third party law suit was analogous to that of the stevedore as a third party defendant prior to the 1972 Amendments to the Act. Under the old law, the stevedore indirectly paid any plaintiff-longshoreman's judgment if it breached its warranty of workmanlike performance. The District Court compared the dire result as follows:

> Accordingly, it was the view of the pre-1972 amendment decisions that to impose a fee in such a case was to charge the stevedore for the privilege of being sued. . .It is true that Hellenic Lines, as employer and self-insurer, will not in any real sense recoup its compensation payments out of the recovery against Hellenic Lines as

> self-insured vessel owner. Since such a "recoupment" would in reality be little more than the transfer of funds from one pocket to another, it cannot be said that the employer here derives a benefit as an incident of plaintiff's attorney's efforts. . .In the light of all the foregoing, this case boils down to one where the court is being asked to compel defendant to pay "for the privilege of being sued" in an action where no benefit will inure to either the stevedore or the injured longshoreman himself.

(See District Court Opinion in Appendix at A31-35; 502 F. Supp. 280, 282-83 (1980).

The Second Circuit was not unmindful of this problem in deciding the matter below when it stated that:

> If we were to pursue that inquiry, we would agree with Judge Neaher that Hellenic's decision to perform its own stevedoring services

> creates a conflict of interest similar to what existed before the Ryan indemnity action was abolished.

(See Court of Appeals Opinion in Appendix at A-15).

Therefore, even if the claim for attorney's fees were to be given priority, the equities and uniqueness of the instant action, where the shipowner and the stevedore are the same entity, mandate that the compensation lien be afforded priority.

V

THE QUESTION IS SUBSTANTIAL AND MERITS REVIEW

The question of the priority of the workmen's compensation lien as opposed to a claim for attorney's fees is a novel and substantial one. It has never been squarely addressed by this Court. The Court has recognized the existence of this question in Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 74, 86 n.13 (1980):

> We do not today address the Valentino situation, and contrary to the implication of the dissent, nothing in our decision suggests that the stevedore's lien has priority over the longshoreman's expenses.

Contrastingly, Mr. Justice Blackmun, in his dissenting opinion, commented that:

> I shall be interested to see whether the

> Court adheres to its present logic when presented with a case where the third-party recovery is so small that virtually nothing is left for the longshoreman. Where the recovery against the shipowner is less than the stevedore's lien and the expenses of the suit, see ante, at 86-87, n.13, 63 L Ed 2d, at 226, it is to be hoped that the injured longshoreman will not be required to disgorge part of his compensation payments. Yet such disgorgement would not be inconsistent with the gloss on congressional priorities that the Court imposes today.

445 U.S. at 96.

The Court's resolution of this question will have broad ramifications. It will define the relative rights of the three claimants to the proceeds of a recovery in a third party action, in an actively litigated area and

provide much needed guidance to the lower Courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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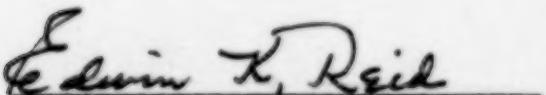

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